

Notable Provisions in the Foreign Investment Risk Review Modernization Act (FIRRMA)

(Introduced November 8, 2017 in U.S. Senate and House of Representatives)

- **Expansion of CFIUS Jurisdiction:** The definition of “covered transaction” is broadened to include not only transactions that result in foreign “control” of a U.S. entity, but also certain joint ventures, minority investments, and real estate transactions near national security facilities. The five new types of covered transactions are:
 - 1. The purchase or lease of real estate in close proximity to a military base or sensitive national security facility.
 - This is intended to close the “greenfield” loophole in a tailored way that avoids subjecting all greenfield investments to CFIUS scrutiny.
 - 2. Non-passive investments in a U.S. “critical technology company” or “critical infrastructure company.”
 - A “passive investment” is defined as one that does not afford the foreign investor access to nonpublic technical information, access to nontechnical information that is not available to all investors, membership/observer rights on the board of directors or the right to nominate an individual to such a position, or any involvement in substantive decision-making other than through voting of shares. It also means the foreign investor and the U.S. business do not have a parallel strategic partnership or other material financial relationship.
 - The definition of “critical technologies” is updated to include “emerging technologies that could be essential for maintaining or increasing the technological advantage of the United States over countries of special concern with respect to national defense, intelligence, or other areas of national security, or gaining such an advantage over such countries in areas where such an advantage may not currently exist.” (See comments above.)
 - 3. Any change in a foreign investors’ rights that would result in control of a U.S. business or a non-passive investment in a critical infrastructure or critical technology company.
 - The idea here is to prevent investment arrangements specifically designed to avoid triggering CFIUS review.
 - 4. Joint ventures or other arrangements that involve the transfer of “both intellectual property and associated support” from a U.S. critical technology company to a foreign entity.
 - The term “associated support” is left open to be defined by future regulations.
 - 5. Other types of arrangements designed to avoid CFIUS review.
 - This seems to be a catchall, acknowledging that it is virtually impossible for Congress to contemplate every tactic that might be employed to evade review.
- **Countries of Special Concern:** Although no foreign country is called out by name, the bill introduces the term “country of special concern,” referring to “a country that poses a significant threat to the national security interests of the United States.” CFIUS is specifically instructed to consider countries of concern in various aspects of its security analysis. (See comments above regarding China.)
- **Additional National Security Factors for CFIUS to Consider:** FIRRMA revises and nearly doubles, from 10 to 19, the number of specific national security factors CFIUS

may consider in its risk reviews (in addition to “such other factors as the President or the Committee may determine to be appropriate”). New factors include:

- Whether the transaction involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology that a U.S. business that is a party to the transaction possesses.
 - Whether the transaction is likely to reduce the U.S. technological and industrial advantage relative to any country of special concern, or contribute to the loss of or other adverse effects on technologies that provide the U.S. a strategic national security advantage.
 - Whether the transaction is likely to create or exacerbate cybersecurity vulnerabilities, or result in a foreign government gaining a significant new capability to engage in “malicious cyber-enabled activities” against the U.S.
 - The extent to which the covered transaction is likely to expose personally identifiable information or other sensitive data of U.S. citizens to access by a foreign entity that may exploit the information in a manner that threatens national security.
 - The degree to which the transaction is likely to increase the cost to the U.S. Government of acquiring or maintaining national security equipment and systems.
 - The potential national security-related effects of the cumulative market share of any one type of infrastructure, energy asset, critical material, or critical technology by foreign persons.
 - Whether the foreign investor has a history of complying with U.S. laws and regulations, including those relating to exports and IP protection.
 - Whether the transaction is likely to facilitate criminal or fraudulent activity affecting U.S. national security.
 - Whether the transaction is likely to expose any information regarding sensitive national security matters or sensitive procedures or operations of a federal law enforcement agency with national security responsibilities to an unauthorized foreign entity.
- ***Simplified Filing Procedures:*** FIRRMA establishes a new method whereby transacting parties could file a “declaration,” generally no more than five pages in length, instead of a full notice to CFIUS. The declaration would be voluntary except in limited cases such as the involvement of a state-owned enterprise. Unlike a “notice,” the declaration would not automatically trigger a CFIUS review, and CFIUS would respond to the declaration either by requesting a full notice that would trigger a review of the transaction, launching such a review unilaterally, or notifying the parties of no further action. CFIUS would have discretion to make declaration-filing mandatory for certain categories of transactions.
 - ***Authority to Exempt Certain Countries:*** CFIUS would be authorized to exempt from the scope of its review transactions in which all foreign investors are from certain countries such as treaty allies or countries with which the U.S. maintains mutual investment security arrangements.
 - ***Slightly Expanded Presidential Authority:*** In addition to suspending or prohibiting a transaction, the President is explicitly authorized to “take any additional action the President considers appropriate to address the risk to the national security.”
 - ***Limited Judicial Review:*** Actions of the President are already exempted from judicial review under existing law, but FIRRMA would extend the exemption to any designee of the President and create a more limited exemption for CFIUS itself. Parties could assert claims of constitutional rights violations, and exclusive jurisdiction would

rest in the D.C. Circuit (subject to Supreme Court review), and the court would be limited to a review of the government's administrative record in reaching a decision.

- ***New Risk Mitigation Tools:*** CFIUS's tools to mitigate risks would be expanded to include the authority to suspend a transaction or impose an interim mitigation agreement pending review, and impose mitigation conditions even where a transaction has been abandoned.
- ***New Compliance Monitoring and Enforcement Tools:*** CFIUS would be required to develop and implement plans for monitoring compliance with mitigation agreements, which are currently subject to uneven enforcement due to resource and other constraints. CFIUS would also have new tools to address noncompliance with mitigation agreements, including seeking injunctive relief. In addition, a mechanism would be created to identify transactions that are covered but for which a notice or declaration has not been filed by the transacting parties.
- ***Increased Transparency:*** Under FIRRMA, the annual unclassified CFIUS report would have to contain more granular information, such as a description of the outcomes of each review or investigation conducted that year; basic information on the transacting parties and the nature of their businesses; whether a mitigation agreement was entered into or conditions imposed, or whether the President took any action on the transaction; and statistics on compliance monitoring and enforcement actions. A new interagency working group chaired by the DNI would be created and tasked with issuing a biennial report on foreign investment risk.
- ***Information Sharing:*** The rules on CFIUS confidentiality would be updated to clarify that information can be shared with other government agencies or foreign governments when necessary for national security purposes.
- ***Funding:*** A "CFIUS Fund" would be created to cover the work of the Committee, and it would be partly funded by the collection of filing fees capped at the lesser of \$300,000 or 1% of the transaction's value.
- ***Special Hiring Authority:*** CFIUS would be able to hire candidates directly without going through the traditional civil service hiring process, boosting the constituent agencies' capacity to bring qualified people on board in a timely manner.